

IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,)	No. CR–87–0135–AP
)	
Appellee,)	Pima County Superior Court
)	Nos. CR14065 and CR15397
v.)	
)	Ninth Circuit No. 14–99002
FRANK JARVIS ATWOOD,)	
)	U.S. District Court No. CV–98–116–
Appellant.)	TUC–JCC
)	
)	(Capital Case)

**APPELLANT’S MOTION FOR EXTENSION
OF TIME TO FILE CROSS-REPLY**

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Appellant Frank Atwood, through undersigned counsel, respectfully moves this Court to grant a 30-day extension of time to file his cross-reply in connection with the warrant motion briefing schedule litigation currently pending before this Court. Mr. Atwood also respectfully requests that consideration of the State's scheduling motion be continued until at least this Court's March motions agenda. Due to the death of Mr. Atwood's counsel of record, Natman Schaye, on Friday, January 28, 2022, time is needed to identify qualified counsel to accept Appellant's representation in these and prospective proceedings. This motion is made pursuant to Mr. Atwood's state and federal rights to due process, the effective assistance of counsel, equal protection, and freedom from cruel and unusual punishment. U.S. Const. amend. V, VI, VIII, XIV; Ariz. Const. Art. 2, §§4, 14, 15, 24, & 31. It is also made pursuant to Rule 6.8, Arizona Rules of Criminal Procedure.

Undersigned have spoken with counsel for the State, Jeffrey Sparks. Mr. Sparks indicates he is not currently able to take a position on the relief requested in this motion but will provide the State's position in an appropriate future pleading.

A. Relevant Background

On January 5, 2022, the State filed a motion asking this Court to set a briefing schedule for an anticipated motion for warrant of execution for Mr. Atwood. Motion to Set Briefing Schedule for Motion for Warrant of Execution (1/5/2022) ("Scheduling Motion"). Thereafter, on January 20, Mr. Atwood timely filed a response in opposition to the Scheduling Motion and a cross-motion requesting a remand for

evidentiary development of material factual issues which underlay the State's motion. Opposition to Motion to Set Briefing Schedule for Motion for Warrant of Execution and Cross-Motion for Assignment for Evidentiary Development (1/20/2022). The State filed its reply and cross-response on January 26, 2022. Reply in Support of Motion to Set Briefing Schedule for Motion for Warrant of Execution/Response to Cross Motion to Remand (1/26/2022). By rule, Mr. Atwood's cross-reply ("the Cross-Reply") is due in this Court by February 2, 2022. Ariz. R. Crim. P. 31.6(e); ARCAP 6(a)(2); *id.* 5(a); Ariz. R. Civ. Pro. 6(a)(2). Additionally, this Court's upcoming motions agenda of February 8, 2022, reflects that the Scheduling Motion will be considered at that time.

On the evening of January 28, 2022, undersigned learned that Natman Schaye, his colleague and Mr. Atwood's lead counsel, had died suddenly and unexpectedly earlier that day while skiing. Due to Mr. Schaye's untimely death, undersigned is currently the only attorney appointed to represent Mr. Atwood in Arizona courts. Undersigned is not qualified to serve as sole counsel in a capital case under Rule 6.8, Arizona Rules of Criminal Procedure ("Rule 6.8").

B. Argument

By this motion, Mr. Atwood respectfully requests that this Court grant a 30-day extension of the deadline for Mr. Atwood to file the Cross-Reply in the pending litigation stemming from the Scheduling Motion. He further requests that consideration of the Scheduling Motion be continued until at least this Court's March

2022 motions agenda. This motion is supported by good cause for the reasons stated below.

First, as noted, undersigned is currently the only attorney appointed to represent Mr. Atwood before this Court, but undersigned is not qualified to do so as a matter of law. Rule 6.8 establishes minimum professional experience standards for the appointment of counsel in capital cases. Mr. Schaye met those minimum standards, but undersigned does not.¹ Undersigned is therefore not qualified to continue as Mr. Atwood's sole counsel as a matter of law, leaving Mr. Atwood effectively without an attorney.

Even if undersigned were qualified to represent Mr. Atwood under Rule 6.8, he could not ethically do so under present circumstance, *i.e.*, without a second qualified attorney. Rule 6.8 requires capital defense counsel to “be familiar with and guided by the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.” Ariz. R. Crim. P. 6.8(a)(5).² The ABA Guidelines require that the defense team in capital cases include “no fewer than two [qualified] attorneys[.]” ABA Guidelines, Guideline 4.1(A)(1). The ABA guidelines also contemplate that the need for a full defense team

¹ Rule 6.8 establishes different standards for different procedural phases of a capital case. Undersigned submits that the correct standard to apply here is the one governing post-conviction cases. Regardless, undersigned is not qualified under the rule no matter which of its standards apply.

² See 31 Hofstra L. Rev. 913 (2003) (hereinafter “ABA Guidelines”).

including at least two qualified attorneys is particularly acute during late stage capital litigation, as “time commitments for counsel increase” due to the need to litigate multiple issues simultaneously in multiple courts. *Id.*, Guideline 10.15.1, Comment, n.335. Consistent with the ABA Guidelines, this Court has also recognized that Rule 6.8 counsels in favor of appointing co-counsel “at *all stages* of capital litigation.” *State v. Pandeli*, 232 Ariz. 175, 190 (2017) (emphasis added). Thus, even if undersigned was qualified to represent Mr. Atwood under Rule 6.8, he could not ethically proceed as sole counsel, particularly in the current posture of this case.

Thus, because of Mr. Schaye’s death, Mr. Atwood does not presently have adequate counsel to prepare the Cross-Reply in the ongoing Scheduling Motion litigation. Crucially, should the Scheduling Motion be granted, he does not have qualified counsel to represent him in the warrant litigation that would follow. Further, he lacks qualified counsel to represent him in his capital post-conviction proceeding that is currently pending in Superior Court. And until appropriate substitute counsel is located, Mr. Atwood would lack qualified Arizona-barred counsel at a clemency hearing,³ in any successive petitions in state court, or any of the other state proceedings likely to occur during late stage capital litigation.

Proceeding with the current litigation under these circumstances would violate Mr. Atwood’s constitutional rights to due process, the effective assistance of counsel,

³ See ABA Guidelines, Guideline 10.15.2 (describing duties of capital clemency counsel).

and equal protection. *Montgomery v. Superior Court*, 178 Ariz. 84, 87 (App. 1993) *quoting* *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (“[A]t a minimum, the United States Constitution requires that the states provide every [postconviction] litigant an ‘adequate opportunity to present his claims fairly.’”); *Ross, supra*, at 612 (equal protection prohibits “unreasoned distinctions” between similarly situated defendants and requires the state to provide “an adequate opportunity to present their claims fairly within the adversary system”) (quotation omitted); *Halbert v. Michigan*, 545 U.S. 605, 617-18 (2005) (due process and equal protection right to counsel during first-tier post-conviction review); *Harbison v. Bell*, 556 U.S. 180 (2009) (right to counsel during clemency proceedings). Moreover, continuing with scheduling Mr. Atwood’s execution at a time he is not represented by adequate counsel would result in a proceeding falling below the heightened standards of reliability in capital cases required by the Eighth Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Plainly, Mr. Atwood must be represented by counsel that is capital qualified as a matter of Arizona law before the State’s efforts to put him to death may proceed. Mr. Schaye died only three days ago. It would be impossible to locate replacement counsel within the timeframe set by the current litigation deadlines, much less get them sufficiently apprised of the case and its relevant legal issues in time for them to meaningfully contribute to the upcoming Cross-Reply deadline or any other matters implicated by the current litigation.

Accordingly, Mr. Atwood respectfully requests that this Court extend the deadline to file the Cross-Reply by 30 days, to March 4, 2022. Mr. Atwood further requests that this Court's consideration of the Scheduling Motion be continued until at least the Court's upcoming March motions agenda. Granting this relief would provide Mr. Atwood an opportunity to locate appropriate replacement counsel, so that he will have minimally adequate representation to both prepare the Cross-Reply and to be positioned to respond to any other litigation matters presented by this Court's ruling on that pleading or the Scheduling Motion. Moreover, because this Court's ruling on Mr. Atwood's cross-motion bears directly on the merits of the Scheduling Motion, deferring ruling on the latter until this Court is able to consider the Cross-Reply is necessary and appropriate.

Even if this Court disagrees about the impossibility of proceeding while Mr. Atwood is represented only by undersigned counsel, Mr. Atwood respectfully requests that the requested relief still be granted. Undersigned has devoted all of his professional time in the last 72 hours to dealing with the ramifications of Mr. Schaye's death, both for Mr. Atwood's cases and for other matters in which his late colleague was counsel, and has therefore been unable to devote time to preparing the Cross-Reply. The extension and continuance requested here is appropriate in light of these unfortunate and extraordinary circumstances.

C. Conclusion

For the forgoing reasons, it is respectfully requested that this motion be granted.

RESPECTFULLY SUBMITTED this 31st day of January, 2022.

/s/ Sam Kooistra
Sam Kooistra
Counsel for Appellant Frank Atwood